

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Accelerating Wireline Broadband)	WC Docket No. 17-84
Deployment by Removing Barriers to)	
Infrastructure Investment)	
)	

**PUBLIC KNOWLEDGE RESPONSE TO OPPOSITION TO PUBLIC KNOWLEDGE’S
PETITION FOR RECONSIDERATION AND MOTION TO HOLD IN ABEYANCE**

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INTRODUCTION

The Commission should grant Public Knowledge's request to reconsider and hold in abeyance¹ portions of the *Second Report and Order*.² Namely, the Commission should disregard the opposition's ineffective arguments, and reconsider in light of NTIA's new concerns. Public Knowledge's relief requested is clear: the Commission should reverse its Second Report and Order in its entirety, in order to fulfill its statutory mandate to protect consumers and ensure adequate service at just and reasonable rates to all Americans during the transition to next generation networks.

I. THE OPPOSITION MISCHARACTERIZES NTIA'S LETTER AND ATTEMPTS TO DOWNPLAY THE WEIGHT THE LETTER BEARS FOR RECONSIDERATION.

The oppositions filed by Verizon, CenturyLink and USTelecom³ all mischaracterize the nature and weight of the letter sent by NTIA on July 19, 2018.⁴ As we originally argued, the NTIA letter specifically calls portions of the Commission's *Second Report and Order* into question, including the potential to affect remote or rural federal agencies facing transition of

¹ *Petition for Reconsideration and Motion to Hold in Abeyance*, Public Knowledge, WC Docket

² *Accelerating Wireline Broadband Deployment by Removing Regulatory Barriers to Infrastructure Investment*, WC Docket No. 17-84, Second Report and Order, FCC 18-74 (adopted June 7, 2018) ("*Second Report and Order*").

³ See Verizon Opposition, WC Docket No. 17-84 (filed Oct. 4, 2018) ("Verizon Opposition"); see CenturyLink Opposition, WC Docket No. 17-84 (filed Oct. 4, 2018) ("CenturyLink Opposition"); see USTelecom Opposition, WC Docket No. 17-84 (filed Oct. 4, 2018) ("USTelecom Opposition").

⁴ See Letter from National Telecommunications and Information Administration, WC Docket No. 17-84 (filed July 19, 2018) ("NTIA Letter").

[https://ecfsapi.fcc.gov/file/10719966416025/NTIA%207-19-18%20Letter%20\(Redl%20to%20Pai\)%20re%20WC%20Dkt%20No.%2017-84.pdf](https://ecfsapi.fcc.gov/file/10719966416025/NTIA%207-19-18%20Letter%20(Redl%20to%20Pai)%20re%20WC%20Dkt%20No.%2017-84.pdf).

networks⁵ and the need for more specific processes and metrics within the adequate replacement test.⁶

NTIA, due its inherent position, is a voice on behalf of the Administration. Anytime the Administration chooses to proactively file a letter expressing concerns, it should be taken seriously-- something the opposing filers are lacking. Though it is true that NTIA generally supports the Commission's *Second Report and Order* and "applauds the Commission's continuing actions to accelerate the ongoing modernization of the Nation's communications infrastructure,"⁷ NTIA's very real concerns and hesitations voiced in its letter cannot simply be overlooked. The opposition suggests that because NTIA has supported the Commission's recent tech transitions actions and the NTIA Letter has an overall amicable tone, that the concerns of NTIA bear no weight on our Petition for Reconsideration.⁸

It is also true that NTIA expressed concerns that "negotiation alone *may* not produce the contractual provisions that adequately serve federal users' needs."⁹ However, contrary to Verizon's argument, the merits of NTIA's concerns are far more paramount than the word choice that mistakenly understates the likelihood of resulting harm.¹⁰ Through both anecdotal evidence and the sheer reality of the rural digital divide, negotiations alone don't produce contractual provisions to adequately serve rural America. This is part of the original reason that the

⁵ NTIA Letter at 2.

⁶ *Id.*

⁷ *Id.* at 1.

⁸ USTelecom Opposition at 2; Verizon Opposition at 2-4.

⁹ Verizon Opposition at 4 (citing the NTIA Letter at 2).

¹⁰ Even assuming the significance of "may" that Verizon assigns to it, the fact that even the Federal government, with its vast resources and negotiating power, has such concerns should make clear how the rules disadvantage the average consumer, small business or locality.

Commission opened a proceeding regarding tech transitions;¹¹ ensuring that consumers have access to reliable communications during the transition to next generation infrastructure, regardless of their buying power or geographic location. This, as NTIA alludes to, includes federal users and subscribers.

Further, NTIA's letter expresses appreciation to the Commission for not eliminating the adequate replacement test.¹² Nowhere in the letter does NTIA endorse the alternative options test or deem it as a compromise, as the Opposition's filings suggest.¹³ In addition, NTIA asks the Commission to "put in place a process a process to enable expanding as necessary the list of protected key applications and functionalities"¹⁴ within the adequate replacement test. Not only does this suggest NTIA favors the adequate replacement test, but it shows that the Commission's rulemaking is incomplete and has not weighed all of their concerns.¹⁵

Thus, the Commission should grant Public Knowledge's Petition for Reconsideration based on the weight of NTIA's Letter expressing concerns regarding the *Second Report and Order*.

¹¹ *Technology Transitions*, Order, Report and Order and Further Notice of Proposed Rulemaking, Report and Order, Order and Further Notice of Proposed Rulemaking, Proposal for Ongoing Data Initiative, 29 FCC Rcd. 1433 (Rel. Jan. 31, 2014).

¹² NTIA Letter at 2-3.

¹³ CenturyLink Opposition at 3-4; Verizon Opposition at 2-4.

¹⁴ NTIA Letter at 2.

¹⁵ Technically, a request for the FCC to create a process to expand the list of protected services and functionalities is not a matter for reconsideration, sine the Commission stated its willingness to add to the initial list when adopted in 2016. Public Knowledge takes this opportunity, however, to express its support for NTIA's recommendation.

II. THE RELIEF REQUESTED BY PUBLIC KNOWLEDGE IS CLEAR AND CONSISTENT WITH PREVIOUS FILINGS: THE COMMISSION SHOULD RECONSIDER AND REVERSE ITS SECOND REPORT AND ORDER IN ORDER TO FULFILL ITS STATUTORY MANDATE TO PROTECT CONSUMERS.

The Opposition argues that Public Knowledge's request relief is unclear and unattainable.¹⁶ To clarify and alleviate any opposing concerns, relief requested is as follows: Public Knowledge requests that the Commission reconsider and reverse its Second Report and Order in its entirety, in order to fulfill its statutory mandate to protect consumers and ensure adequate service at just and reasonable rates to all Americans during the transition to next generation networks.¹⁷ This request is consistent with previous Public Knowledge filings and requests of the Commission.¹⁸

III. THE MOTION FOR ABEYANCE IS PROCEDURALLY PROPER AND SHOULD BE GRANTED.

Verizon argues that the Motion to Hold the Rules In Abeyance is a procedurally improper Motion for Stay.¹⁹ This is incorrect. The critical difference between a stay motion and a motion to hold in abeyance is that a motion to hold in abeyance is a discretionary exercise of authority based on factors other than those required for a Motion for Stay. As Verizon correctly notes, a party must show four factors for grant of a stay: a likelihood of success on the merits, a likelihood of imminent harm, that the balance of equities generally favors the moving party, and

¹⁶ USTelecom Opposition at 8.

¹⁷ See 47 U.S.C. § 151.

¹⁸ See Written Ex Parte of Public Knowledge and Common Cause, WC Docket No. 17-84 (filed May 31, 2018); see Written Ex Parte of Public Knowledge, Communications Workers of America, Institute for Local Self Reliance, National Digital Inclusion Alliance, National Hispanic Media Coalition, and the Utility Reform Network, WC Docket No. 17-84 (filed Nov. 9, 2017) ("*Ex Parte of Public Knowledge et al.*"); see Letter from Public Knowledge et al., WC Docket No. 17-84 (filed Nov. 9, 2017) ("*Letter from Public Knowledge et al.*").

¹⁹ Verizon Opposition at 11.

whether grant or denial generally serves the public interest. Although Public Knowledge believes it will prevail in its challenge to the Commission's 2017 *Report & Order*, Public Knowledge does not expect the Commission to share this view.

Nevertheless, and contrary to the opposition of USTelecom,²⁰ the Commission has sound reason to exercise its discretion and hold the new rules in abeyance pending resolution of the 9th Circuit litigation. The Ninth Circuit litigation challenges the repeal of the "functional test," which mandated adoption of the adequate replacement test in 2016. The "alternative options test," by its nature, fails to meet the functional test adopted by the Commission in 2014 and eliminated by the Commission in 2017. Should Public Knowledge prevail in the Ninth Circuit, the functional test will be restored. Carriers that exited the market on the basis of the alternative options test will find themselves subject to uncertainty as to whether they must now restore service to meet the adequate replacement test, since the alternative test will no longer satisfy the statutory requirements of Section 214.

This is precisely the sort of situation where the Commission should act prophylactically to avoid hardship to subscribers and confusion for carriers by exercising its discretion and holding the alternative replacement test in abeyance. Carriers seeking to exit will still have the ability to do so through the adequate replacement test, a test explicitly endorsed by NTIA. Because Petitioners' reply brief is due November 16, the delay in implementation of the alternative replacement test should not be for an unmanageable period. Given the potential harms should Public Knowledge prevail, the Commission should exercise its discretion and hold the rules adopted in the *2nd R&O* in abeyance.

²⁰ USTelecom Opposition at 9.

CONCLUSION

For the foregoing reasons, the Commission should grant Public Knowledge's Petition for Reconsideration and Motion to hold its *Order* in abeyance.

Respectfully submitted,

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